

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge  
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JAMES ALLEN JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000600  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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The PCR court erred in not finding trial counsel ineffective for failing to object to the admission of Petitioner’s statement pursuant to Missouri v. Seibert, 542 U.S. 600 (2004) ) where the United States Supreme Court precluded the use of mid-stream Miranda warnings and Petitioner’s statement was the result of a two-phase interrogation in violation of Miranda v. Arizona, 384 U.S. 436 (1966) and Missouri v. Seibert, 542 U.S. 600 (2004) which was prejudicial to Petitioner because it was a violation of his due process rights. ....10

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**ISSUE PRESENTED**

Did the PCR court err in not finding trial counsel ineffective for failing to object to the admission of Petitioner's statement pursuant to Missouri v. Seibert, 542 U.S. 600 (2004) where the United States Supreme Court precluded the use of mid-stream Miranda warnings and Petitioner's statement was the result of a two-phase interrogation in violation of Miranda v. Arizona, 384 U.S. 436 (1966) and Missouri v. Seibert, 542 U.S. 600 (2004) which was prejudicial to Petitioner because it was a violation of his due process rights?

## STATEMENT

At the end of April 2011, Petitioner Johnson, his girlfriend Georgia Ann Sprouse, and Sprouse's three daughters moved in with Sprouse's friend, Crystal Inman ("Inman"). App. 560, ll. 3 – 23. Inman was married and had three children. App. 209, ll. 15 – 210, l. 8. Inman and Sprouse had been "childhood friends forever." App. 211, ll. 5 – 9.

On May 25, 2011, Emergency Services responded to a call from Inman's home that a person was choking. The responding firefighters found a child about twenty months old lying on the floor not breathing. Johnson and Sprouse were trying to perform CPR on her. EMS arrived and transported the Minor to the hospital. App. 138, ll. 1 – App. 151, ll. 3.

Sprouse told the police that the child choked on tea and threw up. App. 192, ll. 25 – App. 193, ll. 3. Johnson told the police that he was in the bathroom and did not know what happened. App. 193, ll. 4 – 7.

The pediatric expert, Dr. Mary Crowell, who also had a specialty in child abuse, examined the child while she was on life support. She reported that the child had multiple bruises on her body which raised concern for an abusive injury. App. 362, ll. 5 – App. 367, ll. 16. On May 27, 2011, the child was removed from life support and died. App. 280, ll. 3 – 8.

The pathologist who performed the autopsy, Dr. Michael Ward, also found multiple bruises. App. 488, ll. 5 – App. 489, ll. 25. The pathologist opined that the child died of lack of oxygen to the brain. There was no direct trauma to the brain. App. 496, ll. 1 - 25. Dr. Ward determined that the cause of death was anoxic brain injury due to suffocation and the manner of death was homicide. App. 592, ll. 10 – 16.

On June 2, Investigator Chris Miller and two other officers took Sprouse to the law enforcement center for questioning. App. 454, ll. 10 – 455, li. 5. They told Sprouse the results of

the autopsy and that her story was “just not making sense.” App. 454, ll. 10 – App. 455, ll. 5. Sprouse then spun her third version of events—that she had been asleep from smoking marijuana and was awakened by Johnson who told her that Minor was not breathing. App. 454, ll. 10 - App. 455, ll. 25. Sprouse used this third version as her trial testimony. App. 305, ll. 3 – App. 306, ll. 15.

On June 2, 2011, the police took Johnson to the police station and three officers questioned him for an indeterminate amount of time, no shorter than one and a half hours, and possibly for as long as four or five hours. App. 410, ll. 15 – 25; App. 477, ll. 10 – 13; App. 586, l. 23 – 587, l. 3.

Before a bathroom break, Investigator Miller confronted Johnson with Sprouse’s statement from earlier in the day. App. 88, ll. 4 – 13. Investigator Miller escorted Johnson to the bathroom. App. 88, l. 4 – App. 89, l. 11. When they returned, Investigator Miller told Johnson “that there was things that just didn’t make sense, that I, you know, I needed the truth to come out.” App. 88, ll. 20 – 22. 4. He told Johnson that “sometimes accidents happen” and “that we do things sometimes that we don’t intend to happen.” App. 92, l. 12 – App. 93, l. 4. “I explained that I have kids and, you know, that I know what it’s like to have a kid that’s crying that just will not stop. And, you know, and that I understood where he was—why he was so frustrated.” App. 92, l. 12 – App. 93, l. 4.

Johnson then supposedly told the three policemen in the room that he threw a toy at Minor’s head which caused her to cry. App. 88, l. 4 – App. 89, l. 11. Minor would not stop crying and fearing that it would awaken Sprouse, Johnson told the policemen that “he held his hands over her nose and mouth to make her be quiet, and then she became unresponsive.” App. 88, l. 4 – App. 89, l. 11. Investigator Miller then read Johnson his rights. App. 88, l. 4 – App. 89, l. 11. The policemen typed up a statement and had Johnson initial and sign it. App. 89, l. 5 – App. 93, l. 19. App. 463, l. 20 – App. 464, l. 3.

It was only after this admission, and for the first time, the police read Johnson his Miranda warnings. App. 464, ll. 7 – 12. They continued questioning him, using the information they had already obtained to draft a written statement for Johnson to sign. App. 89, l. 5 – App. 93, l. 19; App. 463, l. 20 – 464, l. 3; App. 467, ll. 4 – 15. Johnson misspelled his own name on the statement. He and his brother testified that he was heavily intoxicated that day. App. 104, ll. 2 – 15; App. 117, l. 19 – App. 118, l. 1. Johnson said he did not remember giving the statement. App. 103, ll. 11 – 13. He was then placed under arrest and taken to jail. App. 94, l. 14 – App. 95, l. 21.

On September 13, 2011, the Greenville County Grand Jury indicted Petitioner Johnson on the charge of homicide by child abuse. App. 711 – App. 712. On June 13, 2013, Johnson proceeded to trial before the Honorable G. Edward Welmaker and a jury. Dorothy Manigault represented Johnson, and the state was represented by Kris Hodge. App. 1.

The trial court held a Blair hearing before the trial began regarding Johnson's mental competency. Dr. Richard Frierson testified that Johnson was mentally retarded as his IQ was below seventy. App. 48, ll. 8 – 18. Dr. Frierson stated that Johnson's retardation prevented him from maintaining competitive employment and speculated that "he might be able to go pick up trash somewhere, but he's not going to be able to support himself with work." App. 51, ll. 1 – 25. Dr. Frierson opined Johnson was competent to stand trial. App. 50, ll. 1 – 6.

Defense counsel requested a pretrial Jackson v. Denno<sup>1</sup> hearing regarding Johnson's statements. App. 43, ll. 10 – 20. The Denno hearing was held. During the Denno hearing, Investigator Miller told Judge Welmaker that he started speaking to Johnson "probably some time right before ten o'clock." App. 86, l. 21 – 87, l. 4. However, Johnson was already at the station when Investigator Miller returned from the mortuary. App. 96, ll. 10 – 23. He described Johnson as

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<sup>1</sup> Jackson v. Denno, 378 U.S. 368 (1964)

making incriminating statements after returning from a bathroom break and once these statements were made, Investigator Miller read him his rights. App. 88, l. 4 –App. 89, l. 11. During cross-examination at the Denno hearing, Investigator Miller allowed “about forty-five minutes to an hour” of “talking” before the bathroom break. App. 98, ll. 13 – 18.

Before the bathroom break, Investigator Miller confronted Johnson with Sprouse’s statement from earlier in the day. App. 88, ll. 4 – 13. Investigator Miller escorted Johnson to the bathroom. App. 88, l. 4 – App. 89, l. 11. When they returned, Investigator Miller told Johnson “that there was things that just didn’t make sense, that I, you know, I needed the truth to come out.” App. 88, ll. 20 – 22. He used the “sympathy” technique to question Johnson. App. 92, l. 12 – App. 93, l. 4. He told Johnson that “sometimes accidents happen” and “that we do things sometimes that we don’t intend to happen.” App. 92, l. 12 –App. 93, l. 4. “Sometimes we lose our temper.” App. 92, l. 12 – 93, l. 4. “I explained that I have kids and, you know, that I know what it’s like to have a kid that’s crying that just will not stop. And, you know, and that I understood where he was—why he was so frustrated.” App. 92, l. 12 –App. 93, l. 4.

It was then that Johnson began to make incriminating statements. He supposedly told the three policemen in the room that he threw a toy at Minor’s head which caused her to cry. App. 88, l. 4 – App. 89, l. 11. Minor would not stop crying so “he held his hands over her nose and mouth to make her be quiet, and then she became unresponsive.” App. 88, l. 4 –App. 89, l. 11. Investigator Miller then read Johnson his rights. App. 88, l. 4 –App. 89, l. 11. The policemen typed up a statement and had Johnson initial and sign it. App. 89, l. 5 –App. 93, l. 19. He was then placed under arrest and taken to jail. App. 94, l. 14 –App. 95, l. 21.

The other officer present during the interrogation was Investigator Jennings Autrey (“Autrey”). App. 61, ll. 15 – 19. Investigator Autrey confirmed that Johnson was already at the

station when he and Investigator Miller returned from dropping Sprouse off at the mortuary. App. 62, ll. 3 – 13. During the Denno hearing Investigator Autrey guessed the entire interview lasted an hour and a half to two hours. App.74, l. 20 – App.75, l. 2. He conceded that Johnson “was a possible suspect at that time.” App. 75, ll. 20 – 22. Investigator Autrey confirmed that Johnson did not receive Miranda warnings until after making incriminating statements. App. 75, l. 23 –App. 76, l. 8. During his trial testimony, Investigator Autrey guessed they had been with Johnson for an “[h]our, hour and a half” before Miranda warnings were given. App. 410, ll. 15 – 25.

The trial judge ruled that Johnson’s statements were freely and voluntarily given and would be admitted. App. 121, ll. 18 – 25. Defense counsel renewed her objection to Johnson’s statement during the trial when the officer told of the interrogation. App. 396, ll. 1 – 22. Counsel objected again when the waiver form and statement were admitted as State’s Exhibits 40 and 41. Counsel made no reference to the basis for the objection and she made no mention of Missouri v. Seibert, 542 U.S. 600 (2004). App. 402, ll. 17 – 25; App. 408, ll. 1 – App. 409, ll. 20.

The jury found petitioner Johnson guilty as indicted. App. 624, ll. 1 – 16.

Johnson filed a timely notice of appeal which was perfected by the Division of Appellate Defense of the Commission on Indigent Defense. The Court of Appeals affirmed Johnson’s conviction on July 29, 2015 on the basis that the issue was not preserved for appeal where one ground was raised below and another ground was raised on appeal: State v. Johnson, Op. No. 2015-UP-378 (Ct. App. filed July 29, 2015). App. 776 – App. 777.

Johnson filed a petition for rehearing which was denied on December 16, 2016. Johnson filed a petition for writ of certiorari to the Court of Appeals with the Supreme Court on January 29, 2016 which the Court granted. On May 24, 2017, the Supreme Court affirmed the opinion of the Court of Appeals. State v. Johnson, Op. No. 2017-MO-009 (2017). App. 690 – App. 691.

On June 13, 2017, Petitioner Johnson filed an application for post-conviction relief (PCR). The state filed a return on October 24, 2017. An evidentiary hearing was held on December 12, 2017 before the Honorable Robin B. Stilwell. Johnson was represented by Rodney Richey, and the state was represented by Deshawn Mitchell. App. 657.

Petitioner Johnson testified at the PCR hearing that his trial counsel did not properly represent him at trial. App. 663, ll. 1 – 25. His statement to the police should have been suppressed because that statement was a most important part of the state's case against him. He did not remember giving that statement. App. 664, ll. 1 – 25.

Johnson continued to testify that the Supreme Court wrote in their opinion on his case that the issue of his statement not being suppressed was not preserved for the Court's review because his trial counsel did not preserve the issue. That was how trial counsel was ineffective in representing him. He was prejudiced or hurt by counsel not preserving the issue because he believed that the outcome of his trial would have been different if the statement had been suppressed. App. 665, ll. 1 - App. 667, ll. 1.

Petitioner Johnson told the court that he had nothing to do with the child's death. He declared that he was not guilty. App. 668, ll. 1-25.

Trial counsel Manigault testified at the PCR hearing that the incriminating statement was given by Johnson to the police on June 2, 2011. Counsel wanted that statement suppressed. However, she admitted that the issue was not preserved because she did not make the motion pursuant to Missouri v. Seibert, *supra*. She agreed that the Supreme Court held that the issue was not preserved. App. 676, ll. 1 – 20. Counsel testified that Johnson insisted on going to trial in spite of the plea offers he received. App. 677, ll. 1 – 24.

On cross-examination, counsel said that there was a Jackson v. Denno hearing because she believed that the statement was not voluntary. However, she failed to make a motion pursuant to Missouri v. Seibert, *supra* to try to keep the statement out. App. 682, ll. 2 – App. 684, ll. 4.

Johnson's mother, Rebecca Parker, testified at the PCR hearing that Johnson's educational level was "low." She explained that he has issues with reading and understanding. She believed that his trial lawyer did not effectively represent Johnson. App. 672, ll. 20 – App. 674, ll. 21.

The PCR judge issued an order on March 21, 2018 denying Johnson's PCR application and dismissing it with prejudice. App. 692 – App. 710. The judge found that Petitioner Johnson could not show that he was prejudiced by trial counsel's failure to preserve the issue for appeal because Johnson failed to prove that the issue would have been successful on appeal. To be successful in a PCR when the issue was raised on direct appeal but found to be unpreserved, the applicant must prove that the "underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability." The judge relied on McHam v. State, 404 S.C. 465, 746 S.E.2d 41, 47 (2013). App. 706.

The judge then wrote that Johnson's case was distinguished from Missouri v. Seibert, *supra*, in that in Seibert, the interrogating officer testified that he made a conscious decision to withhold Miranda warnings. The officer said that he had been taught to question first; give the warnings and then repeat the questions until he got the answer that the suspect had already provided once. App. 708.

However, in Johnson's case, the judge found that Johnson was not under arrest and was involved in a "voluntary conversation" with the officers. When Johnson began to provide "inculpatory" information, the officer immediately stopped and gave the Miranda warnings to Johnson. The PCR judge determined that was not a case of "question first" as used in Seibert.

Therefore, the judge found that Johnson failed to show that the underlying claim was meritorious and would have resulted in reversal on appeal. App. 708. The judge denied the PCR application. App. 710.

Johnson's PCR attorney filed a notice of appeal. This petition follows.

## ARGUMENT

The PCR court erred in not finding trial counsel ineffective for failing to object to the admission of Petitioner's statement pursuant to Missouri v. Seibert, 542 U.S. 600 (2004) ) where the United States Supreme Court precluded the use of mid-stream Miranda warnings and Petitioner's statement was the result of a two-phase interrogation in violation of Miranda v. Arizona, 384 U.S. 436 (1966) and Missouri v. Seibert, 542 U.S. 600 (2004) which was prejudicial to Petitioner because it was a violation of his due process rights.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, supra; Butler v. State, supra.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In S.C. Dept. of Transportation v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903, 907 (2007), the Supreme Court held that in order to preserve an issue at trial for appellate

review, the issue must be raised to and ruled upon by the trial court; raised by the appellant; raised in a timely manner; and raised to the trial court with sufficient specificity.

In Missouri v. Seibert, 542 U.S. 600 (2004), the United States Supreme Court held that Miranda warnings given mid-interrogation, after defendant gave unwarned confession, were ineffective, and thus confession repeated after warnings were given was inadmissible at trial. The Court also held that under Miranda, admissibility at trial of any custodial confession is conditioned on warning suspect of his rights; failure to give prescribed warnings and obtain waiver of rights before custodial questioning generally requires exclusion of any statements obtained.

In Missouri v. Siebert, *supra*, the Supreme Court condemned a deliberate practice used in police departments throughout the country meant to circumvent Miranda. The Court cited the Police Law Institute's manual which instructed officers to use a "two-stage interrogation" and not give Miranda warnings until after arrestees have confessed. The Court listed multiple sources advising officers on how to obtain confessions and then curing the failure to give Miranda warnings. Missouri v. Seibert, *supra*.

The Court called this practice "question-first" and rejected the notion that the subsequent giving of Miranda warnings could transmute these confessions into admissible evidence. Id. at 610-13. "By any objective measure . . . it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." Missouri v. Seibert, *supra* at 610-613.

In State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010), the South Carolina Supreme Court held that the defendant's written statements following Miranda warnings were not

admissible under Seibert, in prosecution for homicide by child abuse where the defendant was subjected to unwarned custodial interrogation for nearly three hours until he gave incriminating answers, and defendant was then allowed only a short supervised break before being given Miranda warnings and having interrogation resume with the same officer.

Petitioner's case is similar to State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). Navy also concerns a Seibert two-phase interrogation. Kenneth Navy was convicted of suffocating his two year old son. EMS responded to Navy's house and found him giving the child CPR. Navy gave an unsatisfactory statement to the police at the hospital that night. The police subsequently met with the pathologist who told them that the child died from suffocation. State v. Navy, Id.

With this knowledge in hand, the police took Navy from his house to the police station. He was not formally under arrest. He gave a statement that was not incriminating. Questioning continued and police confronted Navy with information from the autopsy. The Court found that "[a]t this juncture, the nature of the interrogation and respondent's status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation" without giving Miranda warnings. State v. Navy, Id.

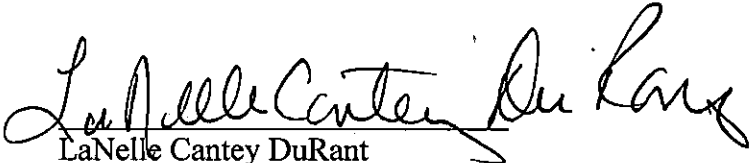
Petitioner Johnson's case has all of the factors as in Navy. The police conduct in this case was more egregious than in Navy. They "began an unwarned custodial interrogation designed to elicit incriminating information." Id. at 303, 688 S.E.2d at 842. Two officers questioned Navy; three questioned Johnson. Both men were picked up from their house by the police. Both men were confronted with contradictory evidence. Both sets of officers knew the results of an autopsy. Neither man received Miranda warnings until after they had confessed. Unlike Navy, though, Johnson is mentally retarded.

In Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), the Supreme Court held that in determining whether the applicant alleging ineffective assistance of counsel has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. In addition, the PCR court should consider the strength of the state's case in light of all the evidence presented to the jury.

Johnson was prejudiced by the police conduct where he confessed before receiving warning about his rights pursuant to Miranda, and after a lengthy interrogation. His statements, both oral and written, should have been suppressed. Trial counsel was ineffective for not objecting to the admission of Johnson's statements pursuant to Missouri v. Seibert, *supra*.

**CONCLUSION**

Based on the above, certiorari should be granted, and Petitioner's convictions and sentences vacated, and the case remanded for a new trial.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of November, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

—————  
Certiorari to Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

—————  
JAMES ALLEN JOHNSON,

PETITIONER

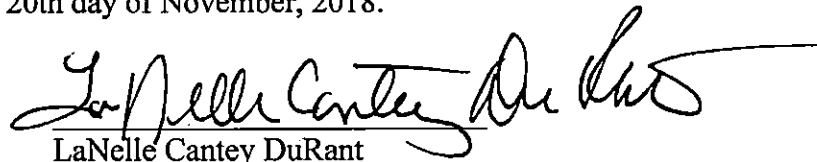
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

—————  
CERTIFICATE OF SERVICE  
—————

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan H. Jameson Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on James Allen Johnson, #355670, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 20th day of November, 2018.



LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 20th day of November, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028